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CASE NO.

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs.

WILL PERKINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether a defendant's identity can ever be considered the suppressible fruit of an illegal search, contrary to the specific holding of *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984)?

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CASE NO.
IN THE UNITED STATES SUPREME COURT
October Term 2000

THE STATE OF FLORIDA,
Petitioner,

vs.

WILL PERKINS,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *State v. Perkins*, 760 So. 2d 85 (Fla. 2000).[A-1].[1] The decision of the District Court of Appeal of Florida, Fourth District is reported at 734 So. 2d 480. [A-17]. The trial court's order denying the motion of Respondent, Will Perkins, to suppress the evidence is not reported.[A-24].

JURISDICTION

The Supreme Court of Florida's opinion was filed on April 27, 2000 and rehearing was denied on June 12, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated..."

Amendment V, United States Constitution, provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself..."

Article I, § 12, Florida Constitution, provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. .... This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution,

STATEMENT OF THE CASE AND FACTS

Officer Wilpidio Pinto of the West Palm Beach, Florida, Police Department observed Respondent Will Perkins driving, and stopped him for a license check. Perkins produced a suspended Florida driver's license, and was charged with driving with a suspended or revoked license. Respondent moved to suppress all evidence arising from the traffic stop, alleging the stop was unlawful because it was made without a warrant, probable cause or founded suspicion. The trial court considered the motion on the following stipulated facts [A-24-25]:

> For the purposes of the Defendant's motion, the facts are undisputed. On July 13, 1997 at 10:45 a.m., the Defendant was driving within the municipal limits of the City of West Palm Beach and was stopped by West Palm Beach Police Officer Wilpidio Pinto. Prior to the traffic stop, Office [sic] Pinto did not see the Defendant commit any traffic violations, commit any other violations of the law, or observe activity that would give Officer Pinto legal authority to effectuate a stop of the Defendant. Although Officer Pinto did not have probable cause to stop the Defendant, once he stopped him, Officer Pinto "ran" the Defendant's driver's license and discovered that the Defendant's driving license privileges had been suspended. Thereupon, Officer Pinto charged the Defendant with the crime of driving with a suspended license.

The trial judge denied Respondent's motion to suppress based on *Ware v. State*, 679 So.2d 3 (Fla. 2d DCA 1996) and *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995), that concluded identity was not a suppressible item of evidence, citing this Court's opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Respondent pleaded no contest, reserving the right to appeal the denial of the motion to suppress. The trial court certified the following question as one of great public importance [A-45]:

> Where the identity of a driver is an essential issue that must be proven, is that identity subject to suppression if it is discovered as a result of an unlawful search and seizure?

The Fourth District Court of Appeal reversed the trial court and certified conflict with *Ware* and *O'Neal* [A-17]. Petitioner filed for conflict review.

The Florida Supreme Court held that the defendant's identity must be suppressed [A-5]:

> "It is clear that in the instant case the evidence required to prosecute the charge of driving with a suspended license came directly from the exploitation of the unlawful stop. We agree with the Fourth District and find 'no basis for distinguishing the circumstances here from others in which evidence must be suppressed, as fruit of the poisonous tree, where discovered following an unlawful stop.'"
>
> * * *
>
> Other courts have suppressed some if not all of the evidence obtained from an unlawful stop in driving with suspended license cases.
>
> * * *
>
> Consistent with this treatment of the exclusionary rule, we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended licence, that officer's post-stop observation of the defendant behind the wheel must be suppressed.
>
> Accordingly, we disapprove O'Neal and Ware and approve Perkins' reversal of the trial court's judgment to the extent it holds the officer's

post-stop observations of the defendant subject to the exclusionary rule.

Petitioner sought Rehearing or Clarification, pointing out that language referring to the post-stop observations of the defendant resulted in a defendant's physical characteristics, that is, identity, being subject to suppression, contrary to *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Specifically, that "the body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Lopez-Mendoza*, 468 U.S. at 1039[A-12].

Rehearing or Clarification was denied June 12, 2000 [A-16].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE IDENTITY OF A DEFENDANT IS SUBJECT TO SUPPRESSION, CONFLICTS WITH A DECISION OF THIS COURT, DECISIONS OF UNITED STATES COURTS OF APPEAL AND DECISIONS OF OTHER STATE COURTS.

The holding herein is directly contrary to the decision of this Court in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).[2]

In this case, an officer stopped Respondent's vehicle to check the status of his driver's license. The officer obtained Respondent's driver's license and discovered it was suspended. The Florida Supreme Court concluded that since the stop was improper, the Fourth Amendment[3] required that the defendant's identity be suppressed. [A-6].

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[2] The decision is also directly contrary to decisions of United States Courts of Appeal and decisions of other state courts. *See, e.g., United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir.), *cert. denied*, 513 U.S. 975, 115 S.Ct. 451, 130 L.Ed.2d 360 (1994); *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1999); *United States v. Arias*, 678 F.2d 1202 (4th Cir.), *cert. denied by Faircloth v. United States*, 459 U.S. 910, 103 S.Ct. 218, 74 L.Ed.2d 173 (1982); *United States v. Adegbite*, 846 F.2d 834 (2d Cir. 1988); *People v. Cobb*, 182 Misc.2d 808, 703 N.Y.S.2d 341 (N.Y. City Crim.Ct. 1997) and *Commonwealth v. Howard*, 442 Pa.Super. 337, 659 A.2d 1018 (1995).

[3] The Florida Constitution provides that its prohibition against illegal searches and seizures must be construed in conformity with the Fourth Amendment of the United States Constitution, as interpreted by this Court. *See* Article I, § 12, Florida Constitution.

In *Lopez-Mendoza*, this Court specifically rejected a claim that a defendant's identity could be suppressed:

> The "body" or identity of a defendant or respondent in a criminal proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

468 U.S. at 1039, 104 S.Ct. 3483-3484.

In concluding that identity could be suppressed, the Florida Supreme Court simply ignored the language of *Lopez-Mendoza*. In attempting to distinguish the case, it pointed out the case was a civil one brought by the Immigration and Naturalization Service to deport an illegal alien. And in moving to suppress, the respondent was not objecting to the identification of his person; rather, he was objecting to the fact that his 'person' was brought before the court. The Florida Supreme Court concluded that when this Court used the term "identity," it referred only to personal jurisdiction. *Perkins*, 760 So.2d at 87 [A-4].

However in reaching its identity-can-be-suppressed conclusion, the Florida court overlooked this Court's treatment of Lopez-Mendoza's co-defendant, Sandoval-Sanchez, who clearly attempted to suppress his identity. In rejecting that claim, this Court unambiguously held that identity cannot be suppressed:

> As the BIA has recognized, in many deportation proceedings 'the sole matters necessary for the Government to establish are the respondent's identity and alienage–at which point the burden shifts to respondent to prove the time, place and manner of entry.' *Matter of Sandoval*, 17 I. & N.Dec., at 79. Since the person *and* identity of the respondent are not themselves suppressible, *see supra*, at 3485, the INS must prove only alienage and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest.

Lopez-Mendoza, 468 U.S. at 1043, 104 S.Ct. at 3485 (emphasis supplied) .

In concluding that a defendant's identity was suppressible, the Florida court also found that Federal Circuit Court cases interpreting *Lopez-Mendoza* had reached the same conclusion:

> Federal cases interpreting the Lopez-Mendoza identity language have similarly understood it to refer to personal jurisdiction. See *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1064 (9th Cir.1994) ("On careful examination, *Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means."); *Accord Brown v. Doe*, 2 F.3d 1236, 1243 (2nd Cir.1993); *United States v. $639,558 in U.S. Currency*, 955 F.2d 712, 715 (D.C.Cir.1992); *United States v. Pelaez*, 930 F.2d 520, 525 (6th Cir.1991); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.1990).

Perkins, 760 So.2d at 87, fn 6.

However, the cases relied on by the Florida Supreme Court are inapposite. None of the cases addressed the question of whether a person's identity is suppressible. Federal District Courts addressing the question (including the Second and Ninth Circuits relied on by the Florida Supreme Court), have concluded that a person's identity is not suppressible.[4]

In *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994), the defendant sought to suppress all evidence of his identity based on an illegal arrest. The Court rejected the respondent's argument:

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[4] *See* Footnote 2, *infra*.

> A defendant's identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search. "[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity." *Hoonsilapa v. INS*, 422 F.2d 735, 738 (9th Cir.) (Hoonsilapa), *modified by*, 586 F.2d 755 (9th Cir.1978). "The 'body' or identity of a defendant ... is never itself suppressible as a fruit of an unlawful arrest." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778
> (1984); . . ..

Guzman-Bruno, 27 F.3d at 421-422.

The Court also found that the fact that the defendant's identity lead to an official file or other independent evidence did not require suppression of that evidence. *Guzman-Bruno*, 27 F.3d at 433. *See also United States v. Adegbite*, 846 F.2d 834, 839-840 (2d Cir. 1988)(agent's discovery of defendant's name was admissible as the identity of a defendant is not suppressible under the exclusionary rule).

Under the Florida Supreme Court's decision, all the officers's post-stop observations were suppressed. [A-6]. Presumably, the Respondent was therefore free to resume the operation of his vehicle. Such a holding has never been consistent with this Court's application of the exclusionary rule. "The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." *Lopez-Mendoza*, 468 U.S. at 1047, 104 S.Ct. at 3488.

Under the Florida Supreme Court's suppression of identity theory, if police stopped a subject because they believed him to be a mass murderer and as a result of that stop confirmed, by sight or otherwise, that the person was in fact the murderer, a finding that the stop was unlawful would apparently bar prosecution of the perpetrator or perhaps allow his release with a "head start." The exclusionary rule was never intended to have such reach.

A person "is who he is." There is nothing inherently incriminating about one's identity. A person's name relates simply to identification, rather than personal, private matters. People typically reveal their identities numerous times on a daily basis. It is virtually impossible to live in today's society without repeated disclosure of name and address, both privately and to the government. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)(what a person knowingly exposes to the public is not subject to Fourth Amendment protection).

Despite this Court's holding in *Lopez-Mendoza*, confusion and conflict exist among the other State and Federal Courts regarding suppression of identity, as evidenced by the Florida Supreme Court's opinion and decisions from other courts. *See, e.g., United States v. Guzman-Bruno*, 27 F.3d at 422 (there is no sanction to be applied when an illegal arrest only leads to the discovery of a man's identity and that merely leads to an official file or other independent evidence); *United States v. Mendoza-Carrillo*, ___ F.Supp.2d ___, 2000 WL 1159114 (D.S.D. Aug. 01, 2000)(finding evidence of identity suppressible); *Turben v. State*, 761 So.2d 1243 (Fla. 2d DCA 2000)(following the Florida Supreme Court's opinion in *Perkins*); *State v. Starr*, 91 Or.App. 267, 754 P.2d 618, 620 (1988)(suppressing defendant's identity); *United States v. Adegbite*, 846 F.2d at 838-839 (defendant's statement regarding identity not suppressible); *People v. Santiago*, 168 Misc.2d 883 645 N.Y.S.2d 746, 748-49 (N.Y.City Crim.Ct. 1996)(officer's identification evidence and observations and DMV records obtained as a result of unlawful stop may be suppressed) and *People v. Cobb*, 703 N.Y.S.2d at 814 (applying no sanction where an illegal arrest only leads to identity and that merely leads to an official file or other independent evidence).

The Florida Supreme Court's opinion is in direct conflict with this Court's decision in *Lopez-Mendoza* finding that a person's identity is not suppressible. This Court should grant the writ of certiorari and summarily reverse the Florida Supreme Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, the State of Florida, respectfully requests that this Court grant its Petition for Writ of Certiorari to the Supreme Court of Florida and summarily reverse the Supreme Court of Florida based on the authorities herein cited.

Respectfully submitted,

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CASE NO.

IN THE UNITED STATES SUPREME COURT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion, Will Perkins v. State, Supreme Court of Florida, April 27, 2000 . . . . . A-1

Motion for Clarification A-11

Order Denying Rehearing, June 12, 2000 . . . . . A-16

Opinion, Perkins v. State, District Court of Appeal of Florida, Fourth District, May 12, 1999 . . . . . A-17

Order Denying Motion to Suppress, Circuit Court of the 15th Judicial Circuit of the State of Florida in and for Palm Beach County Dated January 27, 1998 . . . . . A-24

STATE of Florida, Petitioner,

v.

Will PERKINS, Respondent.

No. SC95741.

Supreme Court of Florida.

April 27, 2000.

Application for Review of the Decision of the District Court of Appeal--Certified Direct Conflict of Decisions Fourth District--Case No. 4D98-1424 (Palm Beach County).

Robert A. Butterworth, Attorney General, Celia A. Terenzio, Bureau Chief, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, Florida, for Petitioner.

Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Respondent.

PER CURIAM.

We have for review the Fourth District's decision in *Perkins v. State*, 734 So.2d 480 (Fla. 4th DCA 1999), which certified conflict with the Third District's decision in *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995), and the Second District's decision in *Ware v. State*, 679 So.2d 3 (Fla. 2nd DCA 1996). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons that follow we approve *Perkins*, and disapprove *O'Neal* and *Ware*.

The respondent, Will Perkins, was stopped by a Palm Beach County police officer on July 13, 1997, for the sole purpose of checking the status of his driver's license. After Perkins was stopped, the officer obtained Perkins' driver's license and

discovered that it was suspended. Perkins was arrested and charged with driving with a suspended license.

Perkins moved the Palm Beach County Court to suppress all the evidence obtained from the stop. The State conceded that the officer did not see Perkins commit any traffic violations, or any other activity justifying a stop. (FN1)

Accordingly, the trial court held the stop unlawful. The State, however, maintained that the evidence obtained from the stop, i.e., the knowledge of Perkins' name and driving record, was not subject to suppression under *O'Neal* and *Ware*. Both *O'Neal* and *Ware* held that the identity of a defendant could not be suppressed as the fruit of an unlawful stop in a prosecution for driving with a suspended license.

The trial court, feeling duty-bound to follow the holdings of the Third and Second Districts in *O'Neal* and *Ware*, denied Perkins' motion to suppress. Thereafter, Perkins pled no contest to driving with a suspended license, reserving his right to appeal. In its order the trial court certified the following question to the Fourth District Court of Appeal as being of great public importance:

> Where the identity of a driver is an essential issue that must be proven, is that identity subject to suppression if it is discovered as a result of an unlawful search and seizure? (FN2)

On appeal, the Fourth District answered the certified question in the affirmative, and certified conflict with *O'Neal* and *Ware*. See *Perkins v. State*, 734 So.2d 480, 483 (Fla. 4th DCA 1999).

O'Neal and *Ware*

In *O'Neal* and *Ware*, the Third and Second Districts answered certified questions in the negative which were nearly identical to that question certified to the Fourth District in the instant case. (FN3) In concluding that a defendant's identity is not a suppressible "fruit" of an unlawful stop in a prosecution for driving while license suspended, both courts principally relied on language from *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Specifically, the *O'Neal* and *Ware* courts cited the following language in Lopez-Mendoza as controlling:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.
>
> Id. at 1039.

We agree with the Fourth District's conclusion that the reliance by the Second and Third Districts on the aforementioned language was misplaced.

In *Lopez-Mendoza*, the Supreme Court addressed the question of whether the "Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). In holding that the exclusionary rule did not extend to civil deportation proceedings, the Court addressed the claims of two aliens, Lopez-Mendoza and Sandoval-Sanchez, both of whom were denied protection of the exclusionary rule in their deportation proceedings.

Lopez-Mendoza claimed his arrest was illegal and, therefore, objected to his compelled presence at the deportation

proceeding. As the Court noted, Lopez-Mendoza neither objected to nor sought the suppression of evidence: "At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." *Lopez-Mendoza*, 468 U.S. at 1040. Lopez-Mendoza essentially claimed that his illegal arrest operated to deprive the immigration court of jurisdiction over his person. It was in the context of this claim, and not a claim to suppress evidence, that the Court issued the language relied upon by the *O'Neal* and *Ware* courts. This distinction was highlighted by the Court in distinguishing Mendoza's claim from that raised in the consolidated case of Sandoval-Sanchez: "Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." *Lopez-Mendoza*, 468 U.S. at 1040. (FN4) Moreover, unlike its treatment of Lopez-Mendoza's claim, the Court did not address the substance of Sandoval-Sanchez's evidentiary claim. The Court instead mooted Sandoval-Sanchez's claim by holding the exclusionary rule inapplicable to civil deportation proceedings. Id. at 1050.

Thus, it appears that the Court's reference to the "body" or identity of a defendant as immune from suppression truly referred to identity in a personal jurisdiction sense. (FN5) This reading is further supported by an analysis of the cases cited by the Court in support of its proposition. See *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) ("Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction."); *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952) ("This Court has never departed from the rule ... that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158, 44 S.Ct. 54, 68 L.Ed. 221 (1923) ("Irregularities on the part of the government official prior to, or in connection with, the

arrest would not necessarily invalidate later proceedings in all respects conformable to law."). (FN6)

Suppression of Evidence

In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Court established the test to be applied when determining whether a Fourth Amendment violation requires the suppression of seized evidence:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Id. at 487-88 (quoting John MacArthur Maguire, Evidence of Guilt 221 (1959)).

It is clear that in the instant case the evidence required to prosecute the charge of driving with a suspended license came directly from the exploitation of the unlawful stop. We agree with the Fourth District and find "no basis for distinguishing the circumstances here from others in which evidence must be suppressed, as fruit of the poisonous tree, where discovered following an unlawful stop." *Perkins*, 734 So.2d at 482; e.g., *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (affirming suppression of marijuana found in plain view as the fruit of an unlawful stop where the driver was randomly stopped solely to check his driver's license and registration and the State offered no empirical data to support its claim that the stop was justified by a broad concern for highway

safety); *United States v. Johns*, 891 F.2d 243 (9th Cir.1989) (suppressing marijuana as the fruit of an unlawful stop).

Other courts have suppressed some if not all of the evidence obtained from an unlawful stop in driving with suspended license cases. See *People v. Santiago*, 168 Misc.2d 883, 645 N.Y.S.2d 746, 748-749 (N.Y.City Crim.Ct.1996) (holding that the officer's identification evidence and observations and the DMV records obtained as a direct result of an unlawful stop may be suppressed); *State v. Asbury*, No. 16771, 1998 WL 309267, at *5-6, No. 16771 (Ohio Ct.App. June 12, 1998) (unpublished opinion) (suppressing the officer's post-stop observation of the defendant in the driver's seat where the evidence established that the officer could not see the defendant or know his identity prior to the unlawful stop); *State v. Starr*, 91 Or.App. 267, 754 P.2d 618, 620 (Or.Ct.App.1988) (suppressing all the evidence flowing from the unlawful stop, including the defendant's name and DMV records); *Zimmerman v. Commonwealth*, 234 Va. 609, 363 S.E.2d 708, 710 (Va.1988) (dismissing an indictment for driving after having been declared an habitual offender where the driver was stopped unlawfully and "defendant's identity and connection with unlawful activity were only first discovered through the illegal stop").

Consistent with this treatment of the exclusionary rule, we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed. (FN7)

Accordingly, we disapprove *O'Neal* and *Ware* and approve Perkins' reversal of the trial court's judgment to the extent it holds the officer's post-stop observations of the defendant subject to the exclusionary rule. We remand for further proceedings consistent with this opinion.

It is so ordered.

HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

QUINCE, J., dissents with an opinion.

QUINCE, J., dissenting.

I agree with the Second District Court of Appeal and the Third District Court of Appeal in *Ware v. State*, 679 So.2d 3 (Fla. 2d DCA 1996) and *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995), that the identity of a suspect gained through an illegal stop is not subject to suppression. (FN8) The decision in both cases was premised on the Supreme Court's holding in *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). And while Lopez-Mendoza involves a deportation proceeding, the principle enunciated by the Supreme Court, that "the body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest" is equally applicable to this criminal proceeding. 468 U.S. at 1039. The State suggests in its brief and at oral argument that the fact which should be subject to suppression in this case is that of driving. It seems clear that law enforcement learned the fact of defendant's operation of a vehicle by the stop of that vehicle; therefore, the fact of driving should be the fact challenged as the fruit of the illegal stop.

FN1. At the suppression hearing the State proffered evidence indicating that another officer radioed the stop officer and advised him to stop the defendant because the officer did not believe he had a license.

FN2. In its order, the trial court reproduced an article by Wayne S. Melnick criticizing the results reached in O'Neal and Ware as being driven by a misreading of federal case law. Wayne S. Melnick, Suppression of Identity: Has the Supreme Court Carved Yet Another Exception to the Exclusionary Rule?, 9 Fla. Defender 24 (1997).

FN3. In Ware, the Second District addressed the identical certified question raised in the instant case. The Third District in O'Neal considered the following question:

> Is the actual identity of a defendant obtained pursuant to an illegal stop suppressible as a fruit of the poisonous tree where the police officer had no knowledge of the defendant's identity prior to the stop?

O'Neal, 649 So.2d at 312.

FN4. Sandoval-Sanchez sought the suppression of statements he made to INS agents during an illegal detention in which he admitted his unlawful entry into the United States. *Lopez-Mendoza* at 1037.

FN5. In *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), the Court addressed the question of whether an "in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest." Id. at 465. In holding that the in-court identification was not the product of the alleged Fourth Amendment violation, the majority opinion refused to answer the question of whether the defendant's "corpus" or "person" could be considered a "species of evidence" and therefore a "possible fruit of police misconduct." That portion of the majority opinion authored by Justice Brennan, however, was joined by only two others, Justices Stewart and Stevens. The remaining five Justices, led by Justice White, thought it appropriate to address the question, and in so doing ostensibly rejected the claim that a defendant's "face can be suppressible as a fruit of an unlawful arrest." Analysis of Justice White's opinion, however, reveals an affirmation of the *Frisbie* rule of personal jurisdiction echoed in Lopez-Mendoza, rather than a complete rejection of identity as a "species" of evidence.

FN6. Federal cases interpreting the *Lopez-Mendoza* identity language have similarly understood it to refer to personal jurisdiction. See *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1064 (9th Cir.1994) ("On careful examination, *Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means."); Accord *Brown v. Doe*, 2 F.3d 1236, 1243 (2nd Cir.1993); *United States v. $639,558 in U.S. Currency*, 955 F.2d 712, 715 (D.C.Cir.1992); *United States v. Pelaez*, 930 F.2d 520, 525 (6th Cir.1991); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.1990).

FN7. Cf. *United States v. Foppe*, 993 F.2d 1444 (9th Cir.1993). In *Foppe*, the defendant was convicted of unarmed bank robbery and on appeal challenged the admissibility of an officer's observations of him during an illegal pat-down search in which the police discovered an ink-stained wad of cash in his back pocket. The officer testified at trial that when he was arrested Foppe had a mustache similar to that of the robber in the surveillance photographs taken at the bank and had since grown a full beard. The State argued that Foppe's subsequent growth of a full beard demonstrated consciousness of guilt. The Ninth Circuit, in analyzing whether the officer's observations were subject to suppression, asked in part "whether the illegal activity tend[ed] to significantly direct the investigation to the evidence in question." Id. at 1449. The Court concluded that the observations of the defendant were incidental to the criminal investigation and therefore not suppressible: "Because incidental observations which police have in mind when detaining a suspect are not objective, suppression of such observations will have no deterrent effect on unlawful police activity." Id.

Such is not the case here where the defendant was stopped for the sole purpose of determining if in fact he was driving with a suspended license. The principal evidence in the instant case is the observation of the defendant behind the wheel. When viewed in

the context of driving with a suspended license, the observations by a police officer of a defendant following an unlawful stop can hardly be described as incidental to the criminal investigation.

FN8. It appears especially harsh to suppress the defendant's identity in this case because there is some evidence that the defendant was known to another officer in the department and the other officer was somehow involved in this stop.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. SC 95741

v.

WILL PERKINS,

Respondent.

_____/

MOTION FOR CLARIFICATION

COMES NOW the Petitioner, the STATE OF FLORIDA, by and through its undersigned counsel and moves this Honorable Court for clarification of its opinion in the above-styled cause, and as grounds therefor respectfully shows this Court:

1. This case arises from a traffic stop in Palm Beach County, Florida. The sole purpose of the stop was to check the status of the respondent's driver's license. During the course of the stop, the police officer determined the license was suspended, and arrested the respondent for driving with a suspended license.

2. Although the trial court denied a timely motion to suppress, it certified the following question to the Fourth District Court of Appeal:

> Where the identity of the driver is an essential issue that must be proven, is that identity subject to suppression if it is discovered as a result of an unlawful search and seizure?

3. The Fourth District Court of Appeal answered the certified question in the affirmative, and the State of Florida petitioned this Court for certiorari review.

4. At oral argument, the State conceded that where a search and seizure is unlawful, some item of evidence must be suppressed if the exclusionary rule announced in *Wong Sun v. United States*, 371 U.S. 471 (1963) is to be enforced. However, the State argued that the defendant's driving record could not be suppressed. *United States v. Crews*, 445 U.S. 463 at 475-77 and n.22 (1980)("The exclusionary rule enjoins the government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.") The State further argued that identity itself, that is, the physical features of the defendant linked to his name, was not an item of evidence which could be suppressed. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Crews, supra*. The State therefore argued that, based on the circumstances, the only item of evidence which was 'suppressible' was the observation by the police officer of the fact of the defendant's driving.

5. Inextricably bound up in this case are the opinions of the Third District Court of Appeal in *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995) and the Second District Court of Appeal in *Ware v. State*, 6793 (Fla. 2d DCA 1996), both of which held, based on the United States Supreme Court's opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), that identity is not a suppressible 'fruit' of an illegal seach; and the Fourth District's opinion below which distinguished *Lopez-Mendoza* on the facts and pointed out the real issue in that case was whether *in personam* jurisdiction could be suppressed.

6. The Court appeared to accept the State's argument in its majority opinion with the following language:

> Consistent with this treatment of the exclusionary rule, we hold that when, as in the

> instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed.
>
> According, we disapprove O'Neal and Ware and approve Perkins' reversal of the trial court's judgment to the extent it hold the officer's post-stop observations of the defendant subject to the exclusionary rule.

7. Clearly, this Court rejected the holdings of *O'Neal* and *Ware* and at least partially accepted the holding of the Fourth District in *Perkins*. However, Petitioner respectfully points out that by disapproving the results of *O'Neal* and *Ware* – rather than merely disapproving their reasoning – this Court has at least implied that identity in and of itself, may be a suppressible 'fruit' of an illegal search and seizure.

8. The lone dissenting opinion in the case at bar exacerbates the situation by expressly agreeing with the district courts' decisions in *O'Neal* and *Ware,* and noting in a footnote:

> It appears especially harsh to suppress the defendant's identity in this case because there is some evidence that the defendant was known to another officer in the department and the other officer was somehow involved in this stop.

9. The last sentence of the dissent concludes, "[T]he fact of driving should be the fact challenged as the fruit of the illegal stop." Petitioner respectfully submits that is the position it took at oral argument, and that language of the dissent is virtually indistinguishable from the majority's statement, "[W]hen, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license,

that officer's post-stop observation of the defendant behind the wheel must be suppressed."

10. The United States Ninth Circuit Court of Appeals has clearly stated that "a defendant's identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search." *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994). Likewise, the Ninth Circuit has held - and the United States Supreme Court has at least implicitly agreed - that the observations of a defendant's appearance made by a police officer cannot be characterized as the "fruit of the poisonous tree" despite the fact that the officer "would never have had the opportunity to observe [the defendant's] appearance had it not been for the illegal search and arrest." *United States v. Foppe*, 993 F.2d 1444, 1449 (9th Cir.), *cert. denied*, --- U.S. ---, 114 S.Ct. 615, 126 L.Ed.2d 579 (1993).

11. Since this issue may involve a federal question, Petitioner respectfully submits this Court should clarify its opinion in the case at bar to state specifically whether a defendant's identity, that is, his or her name and physical appearance, can in and of itself be considered the "fruit of the poisonous tree" and therefore suppressible as the result of an illegal search and seizure, or whether only the observation of that person driving need be suppressed.

WHEREFORE, Petitioner respectfully prays for a clarification of this Court's opinion in the case at bar, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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Counsel for the Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Clarification has been sent by courier to: CHERRY GRANT, Esq., Assistant Public Defender, The Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 on September 8, 2000.

JOSEPH A. TRINGALI
Assistant Attorney General

Supreme Court of Florida

Monday, June 12, 2000

CASE NO.: SC95741
Lower Tribunal No.: 4D98-1424

State of Florida vs. Will Perkins

Petitioner(s) Respondent(s)

Petitioner's motion for clarification is hereby denied.

HARDING, C. J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, J.J., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

tc
Served:

JOSEPH A. TRINGALI
CHERRY GRANT
HON. MARILYN BEUTTENMULLER, CLERK
HON. CORY J. CIKLIN, JUDGE
HON. DOROTHY H. WILKEN, CLERK

Will PERKINS, Appellant,

v.

STATE of Florida, Appellee.

No. 98-1424.

District Court of Appeal of Florida,

Fourth District.

May 12, 1999.

In criminal action, the County Court, Palm Beach County, Cory J. Ciklin, J., denied defendant's motion to suppress. On certified question, the District Court of Appeal, Stone, C.J., held that defendant's identity, which was discovered after defendant was unlawfully stopped while driving a motor vehicle, had to be suppressed.

Reversed, conflict certified, and remanded.

Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

STONE, C.J.

Pursuant to Florida Rules of Appellate Procedure 9.030(b)(4) and 9.160, we accept jurisdiction of the following question certified by the county court as of great public importance:

> WHERE THE IDENTITY OF A DRIVER IS AN ESSENTIAL ISSUE THAT MUST BE PROVEN,

IS THAT IDENTITY SUBJECT TO SUPPRESSION IF IT IS DISCOVERED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE?

We answer the question in the affirmative and reverse.

Perkins was unlawfully stopped while driving a motor vehicle. The officer obtained his driver's license and "ran" the license to determine whether it was valid. The check revealed that Perkins' license was suspended.

Perkins moved to suppress the fruits of the illegal stop. The trial judge recognized that the undisputed facts showed that the officer had no probable cause to stop the vehicle. Nevertheless, the trial court denied Perkins' motion to suppress, acknowledging the binding authority of *Ware v. State*, 679 So.2d 3 (Fla. 2d DCA 1996), and *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995).

In *Ware* and *O'Neal*, the Second and Third Districts decided that the identity of the defendant is not subject to suppression under the same circumstances found in this case. Both cases relied on the United States Supreme Court opinion of *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), which holds that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." Id. at 1039, 104 S.Ct. 3479.

In *Lopez-Mendoza*, the respondent, an illegal alien, was unlawfully arrested at his place of employment. INS agents, without a warrant, entered the premises and questioned the proprietor and Lopez-Mendoza. They learned his name and that he was from Mexico and, without more, arrested him. At the INS office, he confessed that he had not passed through immigration when he entered this country. The court of appeals vacated a

deportation order and the Supreme Court reversed, concluding that a deportation proceeding is purely civil and that various protections that apply in the contest of a criminal trial do not apply in a deportation hearing.

The Court's reversal was based on the maxim that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Lopez-Mendoza*, 468 U.S. at 1039, 104 S.Ct. 3479. The court relied on *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). Both *Pugh* and *Collins* involve the question of whether an illegally arrested defendant can be brought to trial despite the illegality of his detention. As stated in *Collins*, "[t]his Court has never departed from the rule announced in *Ker v. Illinois*, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Id., 72 S.Ct. at 511. The essential issue in *Lopez-Mendoza* was whether he could be "summoned to a deportation hearing following an unlawful arrest." Id. at 1040, 104 S.Ct. 3479. Thus, the question in *Lopez-Mendoza* was one of jurisdiction, not whether the INS could prove his identity, evidence of which was not objected to by the respondent.

In a companion proceeding to that of *Lopez-Mendoza*, the respondent, Sandoval-Sanchez, did object to the evidence as to his identity. The Court ruled that the evidence was admissible, finding that the exclusionary rule did not apply to a deportation hearing. The Supreme Court did not, however, rule on whether the identity of the defendant, learned as a result of the illegal stop, was inadmissible as fruit of the poisonous tree. Therefore, the *Ware* and *O'Neal* courts' reliance on that decision may have been misplaced.

Here, the trial judge observed that *Lopez-Mendoza* was distinguishable, (FN1) but recognized his obligation to follow the district court decisions in *Ware* and *O'Neal*.

We have considered *State v. Ramos*, 598 So.2d 267 (Fla. 3d DCA 1992), and *State v. Leyva*, 599 So.2d 691 (Fla. 3d DCA 1992), addressed in *O'Neal*, but deem them inapposite. In *Ramos*, where an officer had effected a valid *Terry* (FN2) stop, the officer was justified in asking for identification, the proof linking the defendant to the motor vehicle records. In *Leyva*, the police officer knew the subject and knew that his driver's license had been previously suspended.

We can discern no basis for distinguishing the circumstances here from others in which evidence must be suppressed, as fruit of the poisonous tree, where discovered following an unlawful stop. E.g., *Robinson v. State*, 617 So.2d 412 (Fla. 2d DCA 1993); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)(where patrolman stopped a motor vehicle simply to check the driver's license and registration, marijuana found in plain view suppressed as fruit of poisonous tree).

We, therefore, reverse, certify conflict with *Ware* and *O'Neal*, and remand for further proceedings.

FARMER and TAYLOR, JJ., concur.

FN1. Judge Ciklin, before certifying this question, quoted extensively from another county court opinion as follows:

In *State v. Jefferson*, No. 97-003511TC A08 (Fla. 15th Cir.Ct. Oct. 21, 1997), Palm Beach County Judge Barry M. Cohen made a concerted effort to both highlight the important constitutional issues presented by the various cases and distinguish them:

Nonetheless, several district courts have held that the 'identity' of a defendant may not be suppressed even if it occurred after an unjustified stop. *O'Neal v. State*, 649 So.2d 311 (Fla. 3d DCA 1995); *Ware v. State*, 679 So.2d 3 (Fla. 2d DCA 1996)(citing *O'Neal*, 649 So.2d at 311).

Ware and *O'Neal* may be distinguished from the instant case because neither case addresses the issue of what "identity" means.

Both *Ware* and *O'Neal* cite the United States Supreme Courts' [sic] opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), for the principle that identity may not be suppressed. However, the actual language used by the *Lopez-Mendoza* Court was that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."

Id. 468 U.S. at 1039[, 104 S.Ct. 3479]. The *Lopez-Mendoza* Court then cited a line of cases in support of this proposition which dealt with the 'body' of a Defendant in the context of personal jurisdiction, not in the context of offering evidence of identity at trial. See *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952)("[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forceable abduction.' ") (citing *Ker v. Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421 (1886)).

Comparing the two companion cases before the *Lopez-Mendoza* court reveals that the court was addressing personal jurisdiction when it stated that the body or identity of a defendant may not be suppressed. Respondent Lopez-Mendoza "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered

against him." *Lopez-Mendoza*, 468 U.S. at 1040, 104 S.Ct. 3479. Thus, the court concluded "[t]he BIA [Board of Immigration Appeals] correctly ruled that '[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding.' " Id. (citation omitted). However, regarding the respondent in the companion case, the court stated "Respondent Sandoval-Sanchez has a more substantial claim." Id. "He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." Id. The court then applied a *Janis* balancing test to the proceedings at issue and concluded that the balance came out "against applying the exclusionary rule in civil deportation hearings held by the INS." Id. at 1050 (applying the balancing test from *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)). Therefore, the holding of *Lopez-Mendoza* is that in the context of personal jurisdiction, the body or identity of a defendant may not be suppressed and that the exclusionary rule does not apply to civil deportation proceedings. This court concludes that had Sandoval-Sanchez's case arisen in a criminal prosecution, the exclusionary rule would have applied to suppress evidence of the defendant's identity.

Federal cases following *Lopez-Mendoza* have likewise interpreted 'identity' to mean the body or identity of a defendant in the context of personal jurisdiction. See *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1064 (9th Cir.1994)("On careful examination, *Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means."); *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir.1992)("The manner in which Mitchell was brought to trial, however, does not affect the ability of the government to try him. The Supreme Court has upheld this proposition for over 100 years, refusing to apply an exclusionary rule to the body of the Defendant."); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.1990).

Hence, although *Ware* and *O'Neal* did not address what 'identity' means, *Lopez-Mendoza* and the cases which followed make it clear that 'identity' simply refers to the body or person of a defendant for personal jurisdiction purposes.

Id.

FN2. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

IN THE COUNTY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: "G"
CASE NO(S). 97-023335TC A02

STATE OF FLORIDA

vs.

WILL PERKINS,
Defendant.

ORDER ON "DEFENDANT'S MOTION TO SUPPRESS"

THIS MATTER came to be heard upon the Defendant's motion and the Court having been advised that the facts giving rise to the Defendant's motion are undisputed: having heard argument of counsel; and being otherwise fully advised in the premises makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

For purposes of the Defendant's motion, the facts are undisputed. On July 13, 1997 at 10:45 a.m., the Defendant was driving within the municipal limits of the City of West Palm Beach and was stopped by West Palm Beach Police Officer Wilpido Pinto. Prior to the traffic stop, Officer Pinto did not see the Defendant commit any traffic violations, commit any other violations of the law, or observe activity that would give Officer Pinto legal authority of effectuate a stop of the Defendant. Although officer Pinto did not have probable cause to stop the Defendant, once he stopped him, Officer Pinto "ran" the

Defendant's driver's license and discovered that the Defendant's driving license privileges had been suspended. Thereupon, Officer Pinto charged the Defendant with the crime of driving with a suspended license.

The defendant argues that any statements he made to Officer Pinto were obtained in violation of both Florida and federal constitutional law. Additionally, the Defendant asserts that but for the fact that the arresting officer "unlawfully stopped the defendant," the eventual charge against the Defendant would not have been made.

The State counters by asserting that this Court is bound by stare decisis to follow the Second District's holding in Ware v. State, 679 So.2d 3 (Fla. 2d DCA 1996), and the Third Districts's holding in O'Neal v. State, 649 So.2d 311 (Fla. 3d DCA 1995). In both cases, the Second and Third District Courts of Appeal, respectively, held that the actual identity of a defendant obtained pursuant to an illegal stop was not suppressible even if that identity had been discovered as a result of an unlawful search and seizure.

CONCLUSIONS OF LAW

In State v. Jefferson, No. 97-003511 TC A08 (Fla. 15th Cir.Ct. 21, 1997), Palm Beach County Judge Barry M. Cohen made a concerted effort to both highlight the important constitutional issues presented by the various cases and distinguish them:

> Nonetheless, several district courts have held that the 'identity' of a defendant may not be suppressed even if it occurred after an unjustified stop. O'Neal v. State, 649 So.2d 311 (Fla. 2d DCA 1995); Ware v. State, 679 So.2d 3 (Fla. 3d DCA 1996)(citing O'Neal, 649 So.2d at 311).

Ware and O'Neal may be distinguished from the instant case because neither case addresses the issue of what "identity" means.

Both Ware and O'Neal cite the United States Supreme Courts' [sic] opinion in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), for the principle that identity may not the suppressed. However, the actual language used by the Lopez-Mendoza Court was that"[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

Id. 468 U.S. at 1039. The Lopez-Mendoza Court then cited a line of cases in support of this proposition which dealt with the 'body' of a Defendant in the context of personal jurisdiction, *not in the context of offering evidence of identity at trial*. See Frisbie v. Collins, 342 U.S. 519 (1952)("[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'") (citing Ker v. Illinois, 119 U.S. 436, 444 (1886)).

Comparing the two companion cases before the Lopez-Mendoza court reveals that the court was addressing personal jurisdiction when it stated that the body or identity of a defendant may not be suppressed. Respondent Lopez-Mendoza "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest: he entered no objection to the evidence offered against him." Lopez-Mendoza,

468 U.S. at 1040. Thus, the court concluded "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding.'" Id. (citation omitted). However, regarding the respondent in the companion case, the court stated "Respondent Sandoval-Sanchez has a more substantial Claim." Id. "He objected not to his compelled *presence* at a deportation proceeding, but to *evidence* offered at that proceeding." Id. The court then applied a Janis balancing test to the proceedings at issue and concluded that the balance came out "against applying the exclusionary rule in civil deportation hearings held by the INS." Id. at 1050 (applying the balancing test from United States v. Janis, 428 U.S. 433 (1976)). Therefore, the holding of Lopez-Mendoza is that in the context of personal jurisdiction, the body o identity of a defendant may not be suppressed and that the exclusionary rule does not apply to civil deportation proceedings. This court concludes that had Sondoval-Sanchez's case arisen in a criminal prosecution, the exclusionary rule would have applied to suppress evidence of the defendant's identity.

Federal cases following Lopez-Mendoza have likewise interpreted 'identity' to mean the body or identity of a defendant in the context of personal jurisdiction. See United States v. $191,910.00 in U.S. Currency, 16 F 3d 1051, 1064 (9th Cir. 1994) ("On careful examination, Lopez-Mendoza merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means."); United States v. Mitchell, 957 F.2d 465, 470 (7th

> Cir. 1992) ("The manner in which Mitchell was brought to trial, however, does not affect the ability of the government to try him. The Supreme Court has upheld this proposition for over 100 years, refusing to apply an exclusionary rule to the body of the Defendant."); Matta-Bellesteros v. Henman, 896 F.2d 255 (7th Cir. 1990).
>
> Hence, although Ware and O'Neal did not address what 'identity' means, Lopez-Mendoza and the cases whieh followed make it clear that 'identity' simply refers to the body or person of a defendant for personal jurisdiction purposes.

Id. (paragraph number and footnotes omitted) (amended to conform with Florida Rules of Appellate Procedure).

In a recent legal periodical, attorney Wayne S. Melnick provided a revealing analysis to the vexing issues presented by the appellate cases addressing these important issues. Wayne S. Melnick, Suppression of Identity: Has the Supreme Court Carved yet another exception to the Exclusionary Rule?, 9 Fla. Defender 24 (1997). In an attempt to elucidate the important constitutional issues presented, this Court sets out, in its entirety-- and with the footnotes provided in the original-- Mr. Melnick's articulate article:

Suppression of identity: Has the Supreme Court carved yet another exception to the Exclusionary Rule?

> It has always been understood in Constitutional law that if evidence is discovered pursuant to an unlawful search or seizure of a person, then barring any exception, that evidence should be suppressed, This "Exclusionary Rule" was most popularly announced by the United

States Supreme Court in Wong Sun v. United States[1] where the Court held that any evidence recovered as a result of an invalid search or seizure should be suppressed as "Fruit of the poisonous tree."[2]

In this technological age, it has become easy to learn a great deal about a person simply by knowing, and searched of the World Wide Web are just a few examples of how to learn about a person simply by having their identity. This article presents the question of whether the identity of person illegally seized is subject to suppression under the Exclusionary Rule.

Posing a Simple Hypothetical Example of How a Traffic Stop can Lead to a Felony Charge

For the purpose of this article, the author will pose the following fact scenario to further explain the consequences of this grey area of the law.

John Driver is pulled over by the police simply because he is African-American Heritage. During the course of the traffic stop, and in response to the officer's question, Mr. Driver truthfully states his name. A license check is then run by the officer, who learns that Mr. Driver's license is currently suspended. Mr. Driver is cited for that infraction.

During a review of the case by the State Attorney's office, it is learned that Mr. Driver has been convicted previously of at least three driving while license suspended or revoked charges. The State Attorney's office then files felony driving while license suspended or revoked charges

against Mr. Driver.[3] Since this charge is a third degree felony in Florida, Mr. Driver is now subject, if convicted, to a maximum possible sentence of five years in Florida State Prison and a $5,000.00 fine.

Understandably, Mr. Driver's defense counsel files a motion to suppress the identity, and all information learned from that identity, as fruit of the poisonous tree. Included among the items sought to be suppressed are the Department of Motor Vehicles records of Mr. Driver's license suspension. Both the enforcement was made with unfounded suspicion, and as such, was improper. The question now becomes, is the information learned as a result of that admittedly improper stop subject to suppression?

Analyzing the Motion to Suppress Identity

The starting place for this analysis is the recognition that Floridians enjoy an expectation of privacy while operating motor vehicles on the highway. A stop of Mr. Driver's vehicle by law enforcement without at least a reasonable suspicion of criminal activity or probable cause to believe that a civil traffic infraction was committed constitutes a seizure of Mr. Driver as proscribed by the Fourth Amendment.[4] Of course, interpretations of the Fourth Amendment by the United States Supreme Court are the law of Florida.[5] A traditional constitutional analysis would suggest that if the traffic stop was unlawful, that which flowed from it -- the identity of the defendant and all things learned as a result of knowing that identity -- would be subject to the

Exclusionary Rule. However, the answer is not as clear cut as one might think.

Several cases decided by the Third District Court of Appeal deal directly with the issue of a seized person's identity. These cases, which appear contrary to classical Constitutional analysis are State v. Leyva[6] , State v. Ramos[7] , and most recently State v. O'Neal.[8] These cases all rely on Immigration and Naturalization Service v. Lopez-Mendoza.[9] A careful reading of these and other cases reveal serious flaws in their application of Lopez-Mendoza.

First, in State v. Ramos,[10] the Third District Court of Appeal reversed the opinion of the appellate division of the circuit court which had itself reversed the trial curt's denial of the defendant's motion to suppress. Both appellate courts determined the officers had a reasonable suspicion which would justify a brief detention of the driver of an automobile. That court went on to hold that when a detention is authorized, a driver's license may be demanded by the officer. In a footnote unrelated to its holding that the investigatory detention was lawful, the court opined "whether or not the stop was lawful, the identity of the defendant obtained during the stop is not subject to suppression."[11] The Court cited Lopez-Mendoza as the genesis of its belief.

Similarly in State v. Leyva, [12] the same court validated a traffic stop and then gratuitously explained in another footnote "[e]ven if the identity was learned as a result of an unlawful arrest...[it is] not subject to suppression."[13]

It is interesting to note that the "holdings" of both Leyva and Ramos were not necessary to the resolution of each particular case. Both cases merely presented footnotes on what the Court believed to be the state of the law at the time of the opinion.

Related to this is the fact that both Leyva and Ramos involve "pre-stop" identifications. Namely, the officers who identified the defendants in each of those cases were able to do so *prior* to seizing the defendants in question. As such, in those cases, it cannot be said that the defendant's identity was learned solely as a result of the seizure.. Consequently, it makes sense that those identifications would not be subject to suppression.

However, in State v. O'Neal,[14] the Third District was forced with a certified question of whether a persons's identity was subject to suppression following a bad stop. Answering this question in the affirmative, the O'Neal court stated:

> It is clear to us that the "identity of a defendant cannot be subject to "suppression" however the officer's occasion to observe him came about, and, specifically, even if it occurred after an unjustified stop.[15]

In making this determination, the Third District relied expressly on Lopez-Mendoza. Thus, that court explicitly determined that despite the bad stop, a person's identity could not be

suppressed, and an exception to the Exclusionary Rule applied.

The basis for the Third District's view is found at page 786[16] of Lopez-Mendoza. Speaking for the five judge majority in that case. Justice O'Connor held:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search or interrogation occurred.[17]

While this statement appears to be definitive of the issue raised in this article, a close examination reveals otherwise.

In Lopez-Mendoza, the Court applied a balancing proceedings.[18] In rendering the opinion of the majority, Justice O'Connor, is referring, in the opinion of the author, to the presence or physical "body" of the defendant. The Court's holding indicates that a trial court cannot eliminate the fact that the defendant was physically present at the location where the bad stop took place.[19]

This proposition is strengthened when the basis for the Court's determination is more closely examined. In holding the "body" or identity of a person cannot be suppressed, Justice O'Connor cites to, among other cases, Gerstein v. Pugh.[20] In Gerstein, the Supreme Court examined the Constitutionalyty of Florida's procedures for probable cause determinations of incarcerated defendants. The relevant determination Gerstein made as to the issue at hand was:

[a]lthough a suspect who is presently detained may challenge the probable cause for the confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.[21]

Thus, merely because there was an improper procedure used during confinement, the Court was not willing to find the person who was physically confined could not be tried. Thus, the defendant's body could not be treated as if he was not present.

Any other reading of the quoted language would require a fundamental change in the decisional language of the Fourth Amendment. Certainly, the United States Supreme Court would not make such a sweeping change to search and seizure criminal law by dicta in a civil case.

Further support for this contention can be found in other United States Supreme Court precedent. A guide to the correct interpretation of Lopez-Mendoza regarding the "body" of the defendant can be found in note 34 of Payton v. New York.[22] In deciding whether an arrest warrant is necessary to enter a private dwelling, the Court said, " the issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal." Once again, consistent with Gerstein, Payton indicates it is the person himself that cannot be suppressed. I is this, and only this, aspect of the defendant's "body" or "identity", to use the language of Lopez-Mendoza, that is not subject to suppression.

Similarly, at least one other case relying on Gerstein bolsters the contention that "body" or "identity" refers only to a defendant's physical presence. In United States v. Crews,[23] the defendant sought to suppress his face from being used as evidence that would allow him to be identified. The Crews court disagreed, holding:

> Insofar as [the defendant] challenges his own presence at trial, he cannot claim immunity for prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction... [The defendant] is not himself a suppressible "fruit" and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.[24]

The most striking part of this opinion is the Court's proclamation that evidence which can be used to convict the defendant must be wholly untainted by police misconduct.

In the hypothetical example presented above, Mr. Driver's identity would never have been known, but for the illegal stop. That, as opposed to the situation in Crews where the identity of the defendant had been known to the police prior to the arrest.[25] As such, it cannot be said that Mr. Driver's identity, and all that flowed form it, would have been learned if not for the police misconduct.

Additionally, if police are allowed to make random motor vehicle stops to determine the identity of driver's and passengers, the protections accorded by Delaware v. Prouse, are stripped away. There would be no judicial remedy for this governmental wrongdoing.

More Recently Analysis of the Identity Suppression Issue

Most recently in Florida, the Second District Court of Appeal in Ware v. State,[26] addressed the issue of suppression of identity. The Ware court agreed with the Third District's decision in O'Neal when answering a certified question about the issue.[27] In making this determination, the Second District noted the County Court had correctly determined the stop in question was clearly impermissible. However, the Court also noted it had no independent state basis for not following Lopez-Mendoza.[28]

Most interesting about Ware, though, is how the court attempts to distinguish its prior holding in Robinson v. State.[29] In Robinson, the defendant was operating a motor vehicle that was stopped by law enforcement. During the course of the stop, it was determined both that Robinson was driving with a suspended license and had an illegally concealed firearm in his possession. There was no indication the officer who affected the stop knew Robinson's name prior to making the stop.

Robinson was arrested and charged with carrying a concealed weapon and driving while license suspended or revoked. According to the opinion, defense counsel filed a motion to

suppress.[30] Pursuant to applicable case law at the time, the Second District Court of Appeal determined the stop to be invalid.[31] Accordingly, the Robinson court determined the defense's motion to suppress should have been granted, and reversed his conviction for *both* carrying a concealed weapon and driving while license suspended or revoked.

Logically, the Robinson court must have found that all evidence acquired during the bad stop, including Robinson's identity and everything learned form it, was subject to suppression. Otherwise, that court would only have reversed Robinson's conviction with regard to the weapons charge.

Yet, this is precisely what the Ware court focused on in distinguishing Robinson. The Ware court noted:

We are persuaded that the paragraph's syntax includes and exaggerated belief that more than the gun was suppressed. It is only because of the construction of that paragraph that one could be led to believe the suppression order embodied identity. We are unwilling to read that conclusion into the holding of Robinson.[32]

That being so, Ware explicitly found Robinson to not be relevant to the particular issue of suppression if identity. Most interestingly, though, the Third District's opinion in O'Neal ends with a reference to Robinson noting that is "contra" to the result in that case.[33]

Another Jurisdiction's Treatment of the Issue of Suppression of Identity

To date, it seems only New York has dealt directly with the issue of the applicability of the Exclusionary Rule to identity in the context of a criminal proceeding. Only serving to further muddy the waters, though, New York's courts themselves are split to the issue.

In People v. Smith,[34] a trial level court determined that a person's identity was not subject to suppression.[35] In making its determination, Smith relied explicitly on Lopez-Mendoza. It should be noted that for whatever reason, the defense in Smith, conceded that a person's identity could not be suppressed. Rather, in that case, the defense sought, unsuccessfully to suppress the records of the Department of Motor Vehicles ("DMV"). The Smith court ruled the records were kept in the normal course of business by the DMV, and were independently created by a state agency for law enforcement purposes prior to and separate from any police illegality involved in the defendant's detention. Thus, the court concluded, the Exclusionary Rule did not extend to the pre-existing records of the state agency charged with performing the critical function of establishing safety of the public roadways.[36]

Not more than three months late, though, a different New York trial judge ruled exactly the opposite way in People v. Santiago.[37] In Santiago, the defendant also moved to suppress the DMV records retrieved by the arresting officer, claiming that they constituted the fruit of an unlawful seizure.[38]

The Santiago Court was not persuaded that, as a matter of law, the doctrine of "fruit of the poisonous tree" was inapplicable to pre-exciting DMV records which were only accessed by obtaining the defendant's identity though an illegal stop.[39] Rather, the court found that the Exclusionary Rule applies to evidence which flows from illegal seizures, such as verbal statements, identifications, and testimony at trial as to matters observed during or resulting from the unlawful seizure.[40]

Thus, the Santiago court rejected the argument that persuaded the court in Smith, finding the DMV records were suppressible. In doing so, Santiago referred to a long line of New York precedent that established the proposition that identification is not suppressible as contrary to the law.[41]

Most important about Santiago, though, is its rejection of Lopez-Mendoza as controlling law. In reaching this conclusion, the court noted:

The Court is aware of the line of federal case law holding that the body or identity of an individual is not itself suppressible as fruit of an unlawful arrest, and that pre-exciting public records discovered through the exploitation of that information may not be subject to suppression.[42] This Court, however, does not find the holdings in those cases, many of which concern civil deportation proceedings, to be controlling here.[43]

The Santiago court, thus, goes against the grain established by Ware, O'Neal and Smith and agrees with the author's proposition that Lopez-Mendoza does not carve out yet another exception

to the Exclusionary Rule with regard to a person's identity. Of even more interest is to note that Santiago even considered that Third District's opinion in Ramos and rejected it as well.[44]

It is interesting to note that the language of Lopez-Mendoza seems to support the Santiago court's decision that civil immigration cases are entirely different from criminal proceedings. Lopez-Mendoza holds:

> A deportation proceeding is a purely civil action to determine eligibility to remain in this country... The deportation hearing look prospectively to the respondent's right to remain in this country in the future... A deportation is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding, various protections that apply int he context of a criminal trial do not apply in a deportation hearing.

Id. 468 U.S. at 1038-39, 82 L. Ed. 2d at 785-86. The Court then went on to note there are other Constitutional protections that do not apply in civil deportation cases. Among these are: the absence of Miranda warnings do not render an otherwise voluntary statement inadmissible, Navia-Duran v. INS, 519 F. 2d 803. 808 (1st Cir. 1997); involuntary confessions are admissible, Bilokimsky v. Tod. 263 U.S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221 (1923): and Eighth Amendment rights to reasonable bail do not apply. Carison v.

Landon, 342 U.S. 524, 544-46, 72 S. Ct. 525, 96 L. Ed. 547 (1952).

Conclusion

It is clear that a rift has developed with regard to the question of what is a person's "identity" and whether it is suppressible under the Exclusionary Rule in context of a criminal proceeding. Whether the United States Supreme Court meant to create yet another exception to the Exclusionary Rule in Lopez-Mendoza will not be known until that Court addresses the issue directly in an appeal from a criminal proceeding. What is clear, though, is that two different Florida District Court of Appeal have currently ruled that Lopez-Mendoza controls the issue, and that a person's identity is not subject to suppression, even following an admittedly improper seizure.

Even though this is the current law, it is incumbent upon defense attorneys to continue to challenge Florida's interpretation of this exception. This article may serve as a starting place to begin such challenges.

[1] 71 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).
[2] Wong Sun, 9 L. Ed. 2d at 455.
[3] § 322.34, Fla. Stat. (1997).
[4] Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).
[5] Fla. Const. Art. I, § 12.
[6] 599 So. 2d 691 (Fla. 3d DCA 1992).
[7] 598 So. 2d 267 (Fla. 3d DCA 1992).
[8] 649 So. 2d 311 (Fla. 3d DCA 1992).

[9] 468 U.S. 1032. 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984).
[10] 598 So. 2d 267 (Fla. 3d DCA 1992).
[11] Id. at 268. n. 1.
[12] 599 So. 2d 691 (Fla. 3d DCA 1992).
[13] Id. at 694, n. 6.
[14] 649 So. 2d 311 (Fla. 3d DCA 1995).
[15] Id. at 312.
[16] 468 U.S. at 1039, 82 L. Ed. 2d at 786.
[17] 104 L. Ed. 2d 786 (1984).
[18] Clearly, Lopez-Mendoza dealt with the question of civil deportation. As such, the quoted statement, which seems to apply the Court's holding to a "civil or criminal proceeding" is dicta.
[19] Consequently, the United States government could not be estopped from deporting an illegal immigrant physically present in the country, but whose presence was learned of only because of al illegal seizure.
[20] 420 U.S. 103. 119, 95 S. Ct. 854, 43 L. Ed. 2d 54, 68 (1975).
[21] 420 U.S. at 199. 43 L. Ed. 2d at 683
[22] 455 U.S. 573. 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).
[23] 445 U.S. 463. 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980).
[24] 445 U.S. at 474. 63 L. Ed. 2d at 547 (citing Gerstein v. Pugh, supra).
[25] 445 U.S. at 472. 63 L. Ed. 2d at 546. Note: This is perfectly consistent with the author's earlier argument that pre-stop identifications are not suppressible, as was the case in both Leyva and Ramos.
[26] 679 So. 2d 3 (Fla. 2d DCA 1996).
[27] The actual question certified by the county court was "Where the identity of a driver is an essential issue that must be proven, is that identity subject to suppression if it is discovered as a result of an unlawful search and seizure?" Id. at 4.
[28] Id. at 5.
[29] 617 So. 2d 412 (Fla. 2d DCA 1993).
[30] It is important to note that it is not specified in Robinson what type of evidence the defense sought to suppress. It is unspecified whether only the weapon was

the target of the motion to suppress, or all evidence unlawfully obtained, including the defendant's identity.

[31] It should be noted the court determined the officer's actions to be an invalid pretext stop pursuant to Kehoe v. State, 521 So. 2d 1094 (Fla. 1988). It is recognized that pretext is no longer a determinative factor in the question of whether a stop is valid since the Florida Supreme Court's adoption of Whren v. United State, _____U.S. _____, 166 S. Ct. 1769, 135 L.Ed. 2d 89 (1996), in Holland v. State, 22 Fla. L. Weekly S387 (Fla. July 3, 1997). However, the question a person's identity being learned as a result of the bad stop, and in turn, whether it can suppressed, is not affected by this change in law.

[32] Ware. 679 So. 2d at 5.

[33] 649 So. 2d at 312.

[34] 170 Misc. 2d 486 649 N.Y. S. 2d 313 (N.Y. Crim. Ct. 1996).

[35] The Smith opinion was penned by the Honorable Barbara F. Newman on March 29, 1996

[36] Id. 170 Misc. 2d at 492, 649 N.Y. S. 2d at 316.

[37] 168 Misc. 2d 883, 645 N.Y. S. 2d 746 (1996).

[38] The Santiago opinion was penned by the Honorable Robert M. Stolz on June 13, 1996.

[39] Id. 168 Misc. 2d at 885, 645 N.Y. S. 2d. at 748.

[40] Id.

[41] The New Your Court of Appeals had previously held in People v. Gethers, 86 N.Y. 2d 159, 630 N.Y. S. 2d 281, 654 N.E. 2d 102 (1995), that an undercover officer's confirmatory identification of a defendant is subject to suppression of it is the product of an illegal arrest.

Similarly, in People v. Rossi, 80 N.Y. 2d 952, 590 N.Y. S. 2d 872, 605 N.E. 2d 359 (1992), the Court found that the arresting officer's testimony about defendant's conduct, which connected him to the crime charged, was suppressible because the officer's viewing of this conduct was the fruit of his concededly unlawful arrest. See also, People v. Akwa, 151 Misc.2d 106, 573 N.Y. S. 2d 216 (N.Y. Crim.Ct. 1991) (police testimony identifying defendants as being the individuals who were riding in a stolen car suppressible as fruit of an illegal stop). C.f., People v. Dory, N.Y. 2d 121, 463 N.Y. S. 2d 753,450 N.E. 2d 673 (1983) (Observations made by arresting

officer of the defendant's conduct and drug paraphernalia suppressible as fruit of an illegal stop).

[42] See INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984): United States v. Crews, "5 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980): United States v. Guzman-Bruno, 27 F. 3d 420 (9th Cir. 1994); State v. Ramos. 598 So. 2d 267 (Fla. 3d. Dist. 1992); United States v. Pineda-Chinchilla. 712 F. 2d 942 (5th Cir. 1983); United States v. Arias, 678 F. 2d 1202 (4th Cir. 1982); Hoonsilapa v. INS, 575 F. 2d 735 (9th Cir. 1978); United States v. Orozco-Rico, 589 F. 2d 433 (9th Cir. 1978).

[43] Santiago. 1678 Misc. 2d at 887, 645 N.Y. S. 2d at 749.

[44] See. Footnote 42.

Id.

This Court fully understands that it is bound by the Second District Court of Appeal's holding in Ware and the Third District Court of Appeal's holding in O'Neal. This Court additionally acknowledges the Fourth District Court of Appeal's specific admonition in Special Trading Company v. International Consumer Corp., 679 So. 2d 369 (Fla. 4th DCA 1996):

> In reversing, we write the emphasize the rule that all trial judges in Florida are bound by *stare decisis* to follow any district court of appeal decision on point when their own district has not decided the issue...
>
> . . . .
>
> ... A trial judge in Florida is not free to refuse to follow applicable precedent from another district merely because the trial judge disagrees with the holding of that district court. From that standpoint alone,

the decision below is in error and must be reversed.

Id. at 369-370

This Court is duty bound to deny the Defendant's motion to suppress. Because, however, there are no appellate opinions from the Fourth District Court of Appeal as to the issue presented herein and because it is quite possible that the Second and Third District Courts of Appeal may have misapprehended the rule of law pertinent to this issue, this Court is compelled to certify a question as being one of great public importance.

Accordingly, the Defendant's motion is denied.

CERTIFIED QUESTION

Because this issue is of statewide importance, the Court certifies the following question as one of great public importance:

> WHERE THE IDENTITY OF A DRIVER IS AN ESSENTIAL ISSUE THAT MUST BE PROVEN, IS THAT IDENTITY SUBJECT TO SUPPRESSION IF IT IS DISCOVERED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE?

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida, this ____ day of January, 1998.

CORY J. CIKLIN
County Court Judge

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Supreme Court, U.S.
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No.: 00-462

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

vs.

WILL PERKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

Did the state supreme court err in ruling that, when an officer illegally stopped a car, the officer's "post-stop observation of the defendant behind the wheel must be suppressed"?

Does the petition present a controversy under Article III at bar, given that petitioner argued below that evidence that respondent was driving was subject to suppression, the state supreme court ruled that such evidence was to be suppressed, and without such evidence petitioner could not obtain a conviction?

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UNITED STATES CONSTITUTION

Amendment IV 1
Article III. 1, 5, 6

JURISDICTION

The state supreme court entered it decision on 27 April 2000, and denied petitioner's motion for clarification on 12 June 2000.[1] Hence, the petition was timely filed. As discussed below, respondent submits that the Court lacks Article III jurisdiction.

PROVISIONS OF LAW INVOLVED

Article III of the Constitution provides in pertinent part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... .

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

[1] Contrary to the statement in the petition, petitioner did not move for rehearing in the state supreme court.

STATEMENT

Petitioner, the State of Florida, presented a narrow issue to the state supreme court. Petitioner summarized its own argument as follows in its Motion for Clarification below (appendix to petition, A-12):

> At oral argument, the State conceded that where a search and seizure is unlawful, some item of evidence must be suppressed if the exclusionary rule ... is to be enforced. However, the State argued that the defendant's driving record could not be suppressed. [Cit.] The State further argued that identity itself, that is, the physical features of the defendant linked to his name, was not an item of evidence which could be suppressed. [Cit.] The State therefore argued that, based on the circumstances, the only item of evidence which was 'suppressible' was the observation by the police officer of the fact of the defendant's driving.

"The State suggests in its brief and at oral argument that the fact which should be subject to suppression in this case is that of driving." Perkins v. State, 760 So. 2d 85, 89 (Fla. 2000) (Quince, J., dissenting).

The state supreme court agreed with petitioner's argument in deciding that narrow issue: "we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed." Id. 88 (opinion of the court).

ARGUMENT

Petitioner conceded in the state supreme court that "the observation by the police officer of the fact of the defendant's driving" was suppressible. Petitioner's Motion for Clarification below (appendix to petition, A-12). The state supreme court held that the officer's "post-stop observation of the defendant behind the wheel must be suppressed." Perkins v. State, 760 So.2d 85, 88 (Fla. 2000).

The ruling of the state supreme court conforms to this Court's interpretation of the Fourth Amendment. It does not conflict with INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). Having conceded the issue below, petitioner now seeks an advisory opinion from the Court on a question not at issue in the state supreme court.

In Murray v. United States, 487 U.S. 533, 536-37 (1988), the Court wrote (e.s.):

> The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, Weeks v. United States, 232 U.S. 383 (1914), and of testimony concerning knowledge acquired during an unlawful search, Silverman v. United States, 365 U.S. 505 (1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint," Nardone v. United States, 308 U.S. 338 (1939). See Wong Sun v.

United States, 371 U.S. 471, 484-485, 83 S.Ct. 407, 415-16, 9 L.Ed.2d 441 (1963).

Of course, the same rule applies to observations made, and knowledge acquired, during an illegal stop. "[T]estimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States, 1 Cir., 227 F.2d 598." Wong Sun, 371 U.S. at 485; Johnson v. State, 878 S.W.2d 164, 168 (Tex. Crim. App. 1994) (quoting Wong Sun).

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), Border Patrol officers illegally stopped Brignoni-Ponce's car because the occupants appeared to be of Mexican descent. Questioning revealed that the passengers were illegal aliens. Charged with transporting aliens, Brignoni-Ponce moved to suppress "the testimony of and about the two passengers" in the car. This Court questioned "whether voluntary testimony of a witness at trial as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure", id. 876, n. 2 (e.s.), but did not address the question because it was not raised in the petition. The Court went on to hold that the stop was illegal and the trial court should have granted the motion to suppress.

Under Murray, Wong Sun and United States v. Brignoni-Ponce, the state supreme court reached the correct result at bar.

The state supreme court held inadmissible testimony as to the officer's "post-stop observation of the defendant behind the wheel". Testimony as to the officer's post-stop observation of the defendant behind the wheel was suppressible as "knowledge obtained" or "matters observed" during the illegal stop. Such testimony parallels the suppressible testimony "about the two passengers" in Brignoni-Ponce's car.

Notwithstanding the foregoing, the petition argues, largely on the basis of a single sentence taken out of context in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), that the Court should "summarily reverse" the state supreme court's decision.

In INS v. Lopez-Mendoza, Adan Lopez-Mendoza and Elias Sandoval-Sanchez challenged deportation orders entered against them in separate proceedings. At his deportation hearing, Lopez-Mendoza's "counsel moved to terminate the proceeding on the ground that Lopez-Mendoza had been arrested illegally." Id. 1035. He did not challenge any evidence entered at the hearing. The judge ruled that the legality of the arrest was an irrelevant issue. Dismissing his subsequent appeal, the BIA ruled that the "mere fact of an illegal arrest has no bearing on a subsequent deportation

proceeding." Id. 1036. The Court of Appeals reversed the BIA's decision, and the Court granted certiorari.

The Court disposed of Lopez-Mendoza's claims as follows:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952); United States ex rel. Bilokumsky v. Tod, supra, 263 U.S., at 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. See, e.g., United States v. Eighty-Eight Thousand, Five Hundred Dollars, 671 F.2d 293 (CA8 1982); United States v. One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (CA9 1974); United States v. One 1965 Buick, 397 F.2d 782 (CA6 1968).
>
> On this basis alone the Court of Appeals' decision as to respondent Lopez-Mendoza must be reversed. At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him. The BIA correctly ruled that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." [FN concerning possible procedural default omitted] In re Lopez-Mendoza, No. A22452208 (BIA, Sept. 19, 1979, reprinted in App. to Pet. for Cert. 102a.

Id. 1039-40. In Gerstein, the Court ruled that a judicial hearing is not a prerequisite to prosecution by information, noting "the established rule that illegal arrest or detention does not void a subsequent conviction." 420 U.S. at 119. In Frisbie, the Court wrote: "This Court has never departed from the rule ... that the

power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" 342 U.S. at 522. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 158 (1923) states: "Irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law."

Considering INS v. Lopez-Mendoza, especially in light of the cases cited for the proposition in question, one sees that the Court was simply adhering to the rule that an illegal arrest does not automatically invalidate a subsequent prosecution. Lopez-Mendoza did not try to exclude any evidence resulting from the illegal arrest, and so the Court's discussion of his claim did not consider whether identification testimony could be suppressed.[2]

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[2] In fact, courts suppress identification testimony in various circumstances. See United States v. Wade, 388 U.S. 318 (1967) (lineup conducted without presence of counsel), Stovall v. Denno, 388 U.S. 293 (1967) (suggestive identification procedure), Moore v. Illinois, 434 U.S. 220 (1977) (identification at hearing without counsel), and Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints obtained during an illegal detention). Thus, United States v. Crews, 445 U.S. 463, 472-73 (1980), held that the defendant's illegal arrest did not bar the victim's identification testimony only because the victim had seen the defendant at the time of the crime, and was not affected by the subsequent illegal arrest.

Petitioner does not explain how the foregoing proposition applies to the case at bar, much less why it requires summary reversal of the state supreme court's decision.

This Court's treatment of the other petitioner in INS v. Lopez-Mendoza, Sandoval-Sanchez, also does not help petitioner. At his deportation proceeding, Sandoval-Sanchez sought to suppress statements obtained as a result of his arrest.

The Court of Appeals held that his detention violated the Fourth Amendment, that the statements he made were a product of that detention, and that the exclusionary rule barred their use in a deportation hearing. 468 U.S. at 1038.

Reversing, the Court held that "evidence derived from [illegal] arrests need not be suppressed in an INS civil deportation hearing." 468 U.S. at 1051. In reaching this result, the Court listed various factors which significantly reduced "the likely deterrent value of the exclusionary rule in a civil deportation proceeding." Id. 1043. First among these was the fact that, regardless of the legality of the arrest, deportation was still possible if evidence not derived from the arrest was sufficient to support deportation. In a deportation hearing, the Government has only to prove identity and alienage, and because, as discussed regarding Lopez-Mendoza, "the person and identity of the

respondent are not themselves suppressible, see supra, the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest." Id. Again, the Court was simply noting that, once he was before the immigration Judge, Sandoval-Sanchez could not contest his identity as Elias Sandoval-Sanchez. This observation does not stand for the proposition that, in a criminal case, the court must admit identification evidence without regard to its provenance.

At bar, the only evidence that appellant was driving the car - a necessary element of the offense of driving with a suspended license - came from the illegal stop. And, as petitioner agreed below, the evidence that he was driving was subject to suppression.

Thus, petitioner now seems to seek an advisory opinion on an issue as to which no ongoing case or controversy exists. The state supreme court ruled that, as the state conceded, the evidence that Will Perkins was driving the car is to be suppressed. With no controversy on this issue, the Court lacks Article III jurisdiction. "'The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions.' Preiser v. Newkirk, 422 U.S. 395, 401 (1975); see also Flast

v. Cohen, 392 U.S. 83, 97 (1968)." United States Nat'l Bank of Oregon v. Ind. Ins. Agents of American, Inc., 508 U.S. 439, 446 (1993). Federal courts may not "give opinions upon moot questions". Mills v. Green, 159 U.S. 651, 653 (1895), Calderon v. Moore, 518 U.S. 149, 150 (1996).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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